92-1568

MAR 4 1993

NO. _____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1992

ERMA L. ABAD,

Petitioner

versus

KRAFT, INC. and

CHARLES H. DIAL,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
GEORGIA DECISION

Arthur C. Nilsen
COUNSEL FOR PETITIONER
JONAP & Associates, P.C.
1944 Clairmont Road
Decatur, Georgia 30033
(404) 320 - 6000

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution of the State of Georgia of 1983 is unconstitutional as it sets out in the Preamble, to perpetuate the principles of free government and to promote the interests and happiness of the citizens of the state of Georgia without mention of its being subsidiary to the Constitution of the United States and specifically to the Fourteenth Amendment thereof, and further lacking in any statements as to the powers of the state being set out and given thereto by the Constitution of the United States.

2. Does the actions and enforcement of the Constitution of the State of Georgia of 1983, by the Supreme Court of the State of Georgia, by reversing the decision of the Court of Appeals of the

State of Georgia in the instant case involving the diversity of citizens, ie. the Petitioner a resident of New York, and in view of the Preamble to the Constitution of the State of Georgia of 1983, then show greater flagrant emphasis by said court to the reading of Article 1, S 1, P 1, of the Constitution of the State of Georgia of 1983, as to protection to persons and property of Georgia being the paramount duty of the government of Georgia, to which the court is sworn, thus depriving the Petitioner the right of the equal protection of the Fourteenth Amendment of the Constitution of the United States?

3. Whether the Georgia Supreme Court in reversing the Georgia Court of Appeals and affirming the trial court's actions, exceeded their discretion as to the

requirements and permissive discretion of the Official Code of Georgia Annotated Sections: 9-11-38, 9-11-39, 9-11-41(b), and "The Uniform Superior Court Rules" of the State of Georgia, Rules 8.4 and 14, and deprived the Petitioner of the protection of the United States Constitution as to: due process, the right to a trial by jury, and equal protection as to diversity of citizenship, where the record reflected that the trial Judge, called the case, with knowledge of the lack of notice and/or communication with the Petitioner's lawyer as to the actual time for the case to be called but, with the Court's notice of the need for at least 24 - 36 hour advance notice to the Petitioner to permit her to travel to the court in Georgia from the State of New York, her residence, and where the trial

judge, in the absence of the Petitioner or her lawyer, acted and struck the Petitioner's demand for a trial by jury upon motion of the Respondents and then after hearing and considering evidence presented solely by the Respondents entered a judgment finding for the Respondents.

LIST OF ALL PARTIES

Petitioner:

Erma L. Abad

Represented By:

Arthur C. Nilsen
Jonap & Associates, P.C.
1944 Clairmont Road
Decatur, Georgia 30033

Respondents:

Kraft, Inc.

Represented By:

Fain, Major & Wiley, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

Charles H. Dial

Represented By:

Fain, Major & Wiley, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

As 28 U.S.C. s 2403(b) may be applicable:

The State of Georgia

Represented By:

Michael J. Bowers
Attorney General
- State of Georgia
132 State Judicial Building
42 Capital Square, S.W.
Atlanta, Georgia 30334

TABLE OF CONTENTS

		PAGE
I.	Questions Presented for Review	(i)
II.	List of All Parties	(v)
III.	Table of Contents	(vii)
IV.	Table of Authorities	(viii)
V.	Official Report of Case	(ix)
VI.	Statement of Jurisdiction	2
VII.	Statement of the Case	3
VIII.	Argument for Allowance of Writ.	21
IX.	Conclusion	24
X.	Appendix	a

TABLE OF AUTHORITIES

Amendment 5 to the Constitution of the United States.....Appendix Page v

Amendment 7 to the Constitution of the United States.....Appendix Page v

Amendment 14, Section 1, to the Constitution of the United States
Appendix Page w

The Preamble to the Constitution of the State of Georgia of 1983.Appendix Page x

Article 1, S 1, P 1 of the Constitution of the State of Georgia of 1983
Appendix Page x

Article 1, S 1, P 2 of the Constitution of the State of Georgia of 1983
Appendix Page x

Article 1, S 1, P 11 (a) of the Constitution of the State of Georgia 1983
Appendix Page y

Official Code of Georgia Annotated, Section 9-11-38.....Appendix Page z

Official Code of Georgia Annotated, Section 9-11-39.....Appendix Page z

Official Code of Georgia Annotated, Section 9-11-41 (b).....Appendix Page zz

Uniform Superior Court Rules, of the State of Georgia, Rule 8.4
Appendix Page zzz

Uniform Superior Court Rules, of the State of Georgia, Rule 14
Appendix Page zzzz

The pertinent text of the above listed constitutional provisions, statutes and regulations involved in this case, are set out verbatim in the appendix.

OFFICIAL REPORTS OF CASE

State Court of Fulton County, State of Georgia, civil Action File No. 134012, Erma L. Abad vs. Kraft, Inc. and Charles H. Dial.....Appendix Page a

The Court of Appeals of the State of Georgia, Case No.: A91A1084, Erma L. Abad vs. Kraft, Inc. and Charles H. Dial, 201 Ga.App. 523, 411 S.E.2d 500
Appendix Page g

The Supreme Court of the State of Georgia, Case No.: S92C0189, Kraft, Inc. and Charles H. Dial v. Erma L. Abad, 417 S.E.2d 317 (Ga. 1992)...Appendix Page l

Kraft v. Abad, 262 Ga. 336 (1992)

No. _____

IN THE SUPREME COURT OF

UNITED STATES

October Term, 1992

ERMA L. ABAD, Petitioner,

v.

KRAFT, INC. and

CHARLES H. DIAL, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
GEORGIA DECISION

Petitioner Erma L. Abad prays that a writ of certiorari issue to review judgement of the Supreme Court of the State of Georgia, entered on June 23rd, 1992 and upon which the Motion for Reconsideration was denied on December 4th, 1992, by the Supreme Court of the State of Georgia.

STATEMENT OF JURISDICTION

The jurisdiction of this Court, comes forward from the decision of the State of Georgia's court of last resort, the State of Georgia Supreme Court, which, on reconsideration, on December 4th, 1992, affirmed its decision of June 23rd, 1992 and denied the Petitioner's Motion For Reconsideration and thereafter transmitted to the trial court the remittitur.

Further, wherein said court of last resort, the Supreme Court, of the State of Georgia, by its actions has decided an important question of federal law which has not been decided by this Court, and may in fact conflict with applicable decisions of this Court, as to the constitutionality of its state constitution in conflict with the

Constitution of the United States and/or application, interpretation, and/or implementation of its state constitution contrary to established federal law, and the United States Constitution thus jurisdictional ground for this Court is established.

STATEMENT OF THE CASE

This petition for Writ of Certiorari arises out of a motor vehicle collision which occurred on May 27th, 1985, and involved a pickup truck operated by the Petitioner and a tractor trailer operated by the Respondents.

The Petitioner filed her Complaint on July 11th, 1986. Respondents were served with the Summons and Complaint and answered in due course. Discovery was accomplished and the case was ready for trial.

The case appeared on a two week trial calendar beginning July 17th, 1990, Position 11. Counsel for Petitioner at the time of notice, William A. Dinges, issued a letter to the Honorable Nick G. Lambros with copies to the attorneys of

record for the Respondents, advising all parties of the Petitioner's residence, New York State, medical condition and requested a thirty-six (36) hour notice, to provide sufficient travel time. The case was not reached.

The case next appeared on a trial calendar for the weeks of November 5th and 12th, 1990, Position 5. Counsel for the Petitioner at the time of notice, William A. Dinges, issued a letter to the Honorable Nick G. Lambros with copies to the attorneys of record for the Respondents, once again advising all parties of the Petitioner's residence, New York State, and requested a thirty-six (36) hour notice, to provide sufficient travel time. Such notice having been requested, and apparently granted, for prior trial calendars.

The suit came forward for trial on Election Day, Tuesday, November 6th, 1990, when the judge's calendar clerk attempted to notify the Petitioner's attorney at 12:20 P.M., that the judge planned to call the case, that day at 1:30 P.M. The Petitioner and her attorney, having not received the notification personally, were not present at 1:30 P.M. The Trial Court called the case and moved forward in the absence of the Petitioner or her attorney, despite the calendar clerk not having reached the Petitioner or her attorney, to give them reasonable notice to appear. The Trial Judge struck the Petitioner's demand for a jury trial upon motion by the Respondents. The judge having called the case, the Petitioner having failed to put up evidence to prove the elements of its case, due to a lack of reasonable notice

and thus being absent from the court, had the Respondents put up evidence, and after, "hearing & considering evidence offered by the Defendants, the Court hereby enters a judgement in favor of the Defendants with Costs cast upon the Plaintiffs.", at 1:35 P.M. and entered a judgment in favor of the Respondents. The judgment was recorded by the Clerk of the Court by stamp, at 1:54 P.M.

The Petitioner filed a Motion to Vacate Judgment on November 12th, 1990, citing O.C.G.A. 9-11-41 (b) and U.S.C.R. 14 with accompanying affidavit (see appendix page a).

The trial judge denied the Respondent's Motion.

The Petitioner filed an appeal to the Appeals Court of the State of

Georgia, based on its interpretation of O.C.G.A. 9-11-41(b) and U.S.C.R. 8.4.

The Court of Appeals of the State of Georgia found in favor of the Petitioner, reversing the trial court, while not addressing the Petitioner's enumeration of error as to the trial court's error in striking her demand for a jury trial. (see appendix page g).

The Court of Appeals found that O.C.G.A. 9-11-41 (b) was controling in as much as the trial court could only find that the Petitioner and attorney did not make an appearance, amounting to a failure to prosecute the case. O.C.G.A. 9-11-41 (b) only gives the trial court the authority to dismiss the case.

The Respondents on September 16th, 1991, filed a Motion For Hearing with the

Court of Appeals. In their brief which accompanied their motion, the Respondents raised the issue of, "...disparate treatment between litigants resulting from its decision. Article I, Section I, Paragraph II of the Constitution of the State of Georgia of 1983 proclaimed:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the protection of the laws.

Further, the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall 'deny any person'the equal protection of the laws.

The Supreme Court has recently stated that the Georgia Constitution offers Georgia citizens greater rights and even more benefits than the Federal

Constitution. Denton v. Conway Express, Inc., No. S90A1101 (March 15, 1991)" 402 S.E.2d 269 (1991) "(citing Colonial Pipeline v. Brown, 258 Ga. 115, 365 S.E.2d 827 (1988)."

Thus raising the issues presented by the first and second questions propounded by this Petition for Writ of Certiorari.

On October 16th, 1991, the Court of Appeals denied the Respondents' Motion for Reconsideration.

On November 1st, 1991, the Respondents filed a Petition for Certiorari to the Supreme Court of the State of Georgia, stating that they, "Petition this Honorable Court for Certiorari showing the Court that the Court of Appeals' Decision dated September 3, 1991, presents issues of

great concern, gravity and importance to the public."

The Respondents once again raised the question as to the the Georgia Supreme Court finding that, ". . . the Georgia Constitution offers Georgia citizens greater rights and more benefits than the Federal Constitution."

On November 27th, 1991, the Supreme Court of the State of Georgia denied Certiorari to the Respondents.

On December 9th, 1991, the Respondents filed their Motion For Reconsideration of their Motion For A Writ For Certiorari to the Supreme Court of the State of Georgia. The Respondents once again stated that their issue was one of great concern, gravity and public importance, in that, should the Court of

Appeals decision stand, it would affect all future litigants. It was presented by the Respondents, that the question of equal protection of the laws, as, ". . . a right guaranteed by Article 1, Section 1 of the Georgia Constitution. This Honorable Court emphasized that the Georgia Constitution -- as compared to the federal constitution -- affords greater rights and benefits to the citizens of our State. . ."

The three questions of the Petitioner's Petition For Writ of Certiorari, to this Honorable Court, are presented in the Respondents' continued statements in their Motion For Reconsideration to the Georgia Supreme Court, as shown by their statements on page three of their motion, "Most litigants, both plaintiffs and

defendants, are citizens of the State of Georgia and as citizens they are entitled to protection to person and property and the paramount duty of government which is to be impartial and complete. Article 1, Section 1, Paragraph 2 of the Constitution of the State of Georgia of 1983."

On December 20th, 1991, the Clerk's Office, Supreme Court of Georgia, issued notice to the parties that, "The Supreme Court today granted the writ of certiorari in this case. All the Justices concur, except Weltner, Benham and Fletcher, JJ., who dissent. THIS CASE WILL BE ASSIGNED TO THE February 1992, ORAL ARGUMENT CALENDAR. The Court is particularly concerned with the following: Whether the opinion of the Court of Appeals operates to deny

petitioners due process and equal protection of law."

The Respondents filed their brief with the Georgia Supreme Court, and recited their constitutional issues and further addressed question three of this Petition For Writ of Certiorari as to their interpretation of the appropriate codes and rules adding emphasis to the trial court's right to preserve and enforce order.

The Petitioner filed her brief with the Georgia Supreme Court, of whose judgment is sought herein to be reviewed by this Honorable Court. The Petitioner first raised the question as to the trial court's error in striking her demand for a jury trial, without express waiver as required by O.C.G.A. s 9-11-39, and showing the Court of Appeals stance that

the only discretion based on the facts that the trial court had was to dismiss the case without prejudice.

The Petitioner next addressed the Respondents' question of denial of "equal protection and due process of law" as citizens of the State of Georgia, and stated that the true question was one of denial by the trial court of the Petitioner's right to equal protection and due process of law between litigants.

The petitioner on page 8 of her brief addressed both questions one and two of this Petition For Writ Of Certiorari as to the Preamble, Article 1, S 1, P 1 and P 2 of the Georgia Constitution of 1983, and the introduction of the question as to the actions of the Georgia Supreme Court as to a "mind set" being argued by the

Respondents as to the citizens of Georgia.

The question of abuse of discretion by the trial court was raised by the Petitioner, in reminding the Georgia Supreme Court of their statement, "It should be remembered that an order of dismissal for failure to prosecute is discretionary and is subject to appellate review for abuse of discretion. 9 Wright & Miller, Federal Practice and Procedure: Civil, p. 203, S 2370; 5 Moore's Federal Practice 1125, p. 41.11(2), Spyropoulos v. Linard Estate, 255 S.E.2d 40, 243 Ga. 518 (1979). A dismissal with prejudice for failure to prosecute should not be based solely on absence but on ALL the circumstances of the case. See Link v. Wabash R. Co., 370 U.S. 626, 634-635, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)."

The Petitioner then presented the question of balance as to the parties before the court and the question of disparity as to the question of application of the state and federal constitutions as to equal protection and due process.

On June 23rd, 1992, the Supreme Court of the State of Georgia, reversed the Court of Appeals, not reaching the issue of the striking of the jury demand nor the question of due process or equal protection but, rather retreated to the point that a trial court may go forward with the setting of another trial date, or alternatively, the court may go forward with the trial of the case as was done. The judgment was then deemed to be that of any other judgment. (see appendix page 1)

There was a dissent issued which strongly supported the position of the Court of Appeals.

On July 2nd, 1992, the Peitioner filed a Motion For Reconsideration with the Supreme court of Georgia. Based on the actions of the Supreme Court in its decision, the Petitioner cited specifically that the Supreme Court of Georgia had misconstrued and/or misapplied not only O.C.G.A. 9-11-1, O.C.G.A. 9-11-38, O.C.G.A. 9-11-39 (a), O.C.G.A. 9-11-41 (b), Article 1, Section 1, Paragraph 11 of the Constitution of the State of Georgia of 1983 but, also The Fifth, Seventh and Fourteenth Amendments of the United States Constitution.

The Petitioner emphasized the "lost factor", that the trial court had struck

the Petitioner's demand for a trial by jury without waiver or statutory or constitutional grounds. Emphasis was further placed on the denial of equal protection to all future litigants and the risk of said future litigants "losing their right to a trial by jury as guaranteed by the constitutions of the United States and the State of Georgia." (page five of Petitioner's Motion) In conclusion the Petitioner stated, "The Honorable Court risks sending a loud and clear message that the rights of the trial court to control its calendar exceed the rights of the individual to the basic common law right to a trial by jury."

The Respondents filed a Reply And Opposition To Motion For Reconsideration, as to the question of the waiver of the

jury demand, and stated on page three of their motion, "Even assuming arguendo, that the trial court erred in striking the Appellee's demand for jury trial, it was harmless error." No further issues or new presentations were made.

On December 4th, 1992, the Georgia Supreme Court denied the Petitioner's Motion of Reconsideration thru and to the Court of Appeals of Georgia and affirmed its decision of June 23rd, 1992 and thereafter transmitted to the trial court the remittitur. see appendix page s)

ARGUMENT FOR ALLOWANCE OF WRIT

This is a case involving the diversity of citizenship of the parties. While this case originated in a state court, the rights of all citizens of the United States are guaranteed by the United States Constitution yet those of the Petitioner were abridged.

Proper notice of and opportunity to present her case in the trial court was not afforded the Petitioner, while the trial court had full knowledge of her diversity of residence, that being a resident of the State of New York, while the trial court sat in session in the State of Georgia.

The Petitioner's right to a trial by jury, was arbitrarily torn from her by the trial judge, contrary to

constitutional and statutory mandates.

The judicial review of the trial court's actions was tainted by the reading of the Constitution of the State of Georgia 1983, giving greater weight to the citizens of the state over those citizens of other states, coupled with the judicial record of and statements therein by the court of last resort for the State of Georgia, the Georgia Supreme Court, thus depriving the Petitioner of her United States Constitutional rights as a citizen, to equal protection, due process of law and protection of her property rights, sought to be addressed by the court action as a plaintiff against the Respondents for a motor vehicle collision in which the Petitioner was injured and lost personal property.

The State of Georgia, court of last resort has stated, "that the Georgia Constitution offers Georgia citizens greater rights and even more benefits than the Federal Constitution." Denton v. Conway Express, Inc., No. S90A1101 (March 15, 1991) 402 S.E.2d 269 (1991). The actions of the Georgia Supreme Court, in its ruling on this case shows it to be once again following the authority and/or its own interpretation of its state constitution versus the dictates of the United States Constitution as to state rights and the rights of all citizens of the United States, and thus establishing lesser rights for noncitizens of the State of Georgia in its court. The Georgia Constitution wanes in its power and authority to the Fourteenth Amendment to the United States Constitution and as such this case is ripe for judicial

review by this Honorable Court to the questions of conflict of authority and subsequent decisions.

CONCLUSION

For the reasons stated, the writ should be granted and the judgement of the Supreme Court of the State of Georgia should be reversed and the case remanded to the trial court for a jury trial.

Date this 2nd day of March, 1993.

Respectfully submitted,

Jonap & Associates, P.C.

Arthur C. Nilsen
Counsel for Petitioner
Erma L. Abad

APPENDIX

Erma L. Abad

v. Civil Action
134012

Kraft, Inc. & Charles H. Dial

Judgement

The case having come on for trial with notice to all parties, the Court having struck the demand for jury trial upon motion by Defendants, the Court having called the case, the Plaintiff having failed to put up evidence to prove the elements of its case, the Court after hearing & considering evidence offered by the Defendants, the Court hereby enters Judgement in favor of the Defendants with Costs cast upon Plaintiffs.

This 6th day of November, 1990.

Signature Affixed
Nick G. Lambros
Judge, Fulton State Court

Affidavit:

PERSONALLY APPEARED before the undersigned officer authorized to administer oaths, **WILLIAM A. DINGES** who, after being sworn, deposes and says:

1.

I am over 18 years of age and I am competent to give this affidavit. I am attorney of record for the Plaintiff in this action.

2.

This lawsuit appeared on a trial calendar published on October 15, 1990, in the fulton County Daily Report. The calendar was for the weeks of October 5 and October 12, 1990. Cases on the calendar were palced on one-hour call. This lawsuit was case #5.

3.

As with previous calendars, a thirty-six hour notice was requested because the Plaintiff resides in New York. As before, I anticipated notice in some amount beyond one hour topermit me to procure the attendance of my client.

4.

On November 6, 1990, at 12:20 P.M., Glenda Burton, Judge Lambros' Calendar Clerk, called my office and asked to speak to me. I was not present hving left my office to vote. She then asked to speak with my paralegal. He was at lunch. Ms. Burton requested that she be connected with the firm's voice mail. She left a message that the case was called to trial and that I was to report at 1:30 P.M. to strike a jury. My client need not report until 9:00 A.M. on November 7. The foregoing was verified

by me in a telephone conversation with Ms. Burton on Novemebr 6. Unfortunately, the voice mail message went astray.

5.

Ms. Burton called a second time at approximately 1:30 P.M. However, before the call could be taken, Ms. Burton hung up. I discovered in a subsequent telephone conversation with Ms. Burton that she had been called into the courtroom by the Judge at that time.

6.

A subsequent call to Ms. Burton by my paralegal at approximately 1:35 P.M. revealed that a Defendant's Judgment had already been entered. This was also verified by Ms. Burton in the subsequent telephone conversation.

7.

The judgment in the case was filed

by the clerk of Court, as shown by his stamp, at 1:54 P.M. on November 6, 1990.

8.

Contrary to the implication contained in the judgment, I was not present for the call of the case for trial. Further, Plaintiff did not fail "...to put up evidence to prove the elements of its (sic) case... ." Had I been present I would not have agreed to the striking of Plaintiff's demand for a jury and would have insisted on a trial by jury.

This affidavit is made upon my personal knowledge for use in support of Plaintiff's Motion to Vacate Judgment and I depose that if sworn as a witness in this action I could and would competently testify to the foregoing facts.

Signature of Record
WILLIAM A. DINGES

State of Georgia
County of Dekalb
Sworn to and subscribed before me
this 12th day of November, 1990.

Signature of Record for Daniel L. Hale
NOTARY PUBLIC

In the Court of Appeals of Georgia

A91A1084. ABAD v. KRAFT, INC.

COOPER, Judge. Issued 9/3/91

This appeal arises from a judgment entered in favor of defendant when plaintiff failed to appear at the call of her case for trial.

The trial court's order, entered on November 6, 1990, recites the following: "The case having come on for trial with notice to all parties, the court having struck the demand for jury trial upon motion by defendants, the court having called the case and the plaintiff having failed to put up evidence to prove the elements of its case, the court after hearing and considering evidence offered by the defendants, the court hereby enters judgment in favor of the defendants . . ." Plaintiff's attorney

admits that the case appeared on a trial calendar for the week of November 6 but contends that when the case had appeared on previous calendars, the trial judge had granted him thirty-six hours notice in which to appear because plaintiff resided in New York. Plaintiff alleges that on November 6, 1990 at 12:20 p.m., the trial court's calendar clerk called his office and left a message that the case would be called for trial at 1:30 p.m. Although the trial court's order states that plaintiff failed to put up evidence to prove the elements of her case, it is undisputed that neither plaintiff nor her attorney appeared for the trial of the case on November 6, 1990. Plaintiff argues that the non-appearance of plaintiff or her attorney for the trial amounted to a failure to prosecute the case; therefore, the trial

court only had authority to dismiss her case pursuant to OCGA s 9-11-41 (b). We agree and reverse the trial court. "For failure of the plaintiff to prosecute . . . , a defendant may move for dismissal of an action . . . (Such dismissal) does not operate as an adjudication upon the merits . . ." OCGA s 9-11-41 (b). In addition, Rule 14 of the Uniform Rules for the Superior Courts, which pursuant to the Uniform State Court Rules, is also applicable to the State Courts, provides: "On its own motion or upon motion of the opposite party, the court may dismiss without prejudice any civil action . . . upon the failure to properly respond to the call of the action for trial or other proceeding." Thus, both the Civil Practice Act and the Uniform Rules of the Superior Courts provide an appropriate

sanction which may be employed by the court when a plaintiff fails to appear at the call of his case for trial. In the case sub judice, the trial court went beyond the available sanction and entered a judgment in favor of the defendants. while we recognize the broad discretion a trial court has in regulating the business before it, Ford Motor Credit Co. v. Williams, 194 Ga. App. 405 (1) (390 SE2d 640) (1990), we find no authority for the action taken by the trial court. Consequently we conclude that the trial judge abused his discretion in entering a judgment against plaintiff when she failed to appear for trial.

Because we are reversing the trial court, we find it unnecessary to address plaintiff's remaining enumeration of error that the trial court erred in

striking her demand for jury trial.

Judgment reversed. Birdsong, P.J., and Pope, J., concur.

In the Supreme Court of Georgia

Decided: Jun 23 1992

S92G0189. KRAFT, INC. v. ABAD

CLARKE, Chief Justice.

Erma L. Abad, who lives in New York, was in an automobile accident with a vehicle driven by an employee of Kraft, Inc. She filed a personal injury action against Kraft in Fulton County. The case appeared on the trial calendar three times. Each of these calendars provided notice to plaintiff's counsel that the case could be called for trial on that day. The third time the case was on the calendar, the case was reached. The trial court's docket clerk had telephoned Abad's attorney an hour before the case was reached. Abad was in New York recovering from abdominal surgery. Her

attorney could not be reached by phone. Neither Abad nor her attorney appeared at the call of the case. The trial court heard evidence put forward by defendant Kraft and entered judgment in its favor. The Court of Appeals reversed, saying that under OCGA S9-11-41(b) (lack of prosecution) or Superior Court Rule 14 (Failure to respond to calendar call) the trial court had only the authority to dismiss the action without prejudice. We granted certiorari and now reverse.

OCGA S9-11-41(b) and Superior Court Rule 14 both contain permissive language. Under either provision the court <u>may</u> dismiss an action without prejudice if the plaintiff fails to appear at the call of the case. Neither provision, however, exhausts the options available to the trial court under its authority to

control its own docket and regulate the business of the court. Scocca v. Wilt, 243 Ga. 2 (252 SE2d 401) (1979). The rule and the statute simply allow the court to dismiss the action and restricts the dismissal to one without prejudice. It goes without saying that the trial court may elect to continue the case and set it for trial on another date. Alternatively, the court may go forward with the trial of the case as was done here. The judgment that is entered following such a trial is not a dismissal. It is a judgment like any other judgment that is subject to appeal, motion for new trial, or a motion to set aside under OCGA S9-11-60.

Because we reverse on the above grounds, we do not address Kraft's remaining arguments.

Judgment reversed. All the Justices concur, except Benham, Fletcher and Sears-Collins, JJ., who dissent.

S92G0189. KRAFT, v. ABAD

BENHAM, Justice, dissenting.

It is provided in OCGA S 9-11-1 that the Civil Practice Act "shall be construed to secure the just, speedy, and inexpensive determination of every matter."

The fact that the language in OCGA S 9-11-41 (b) and Uniform superior Court Rule 14 is permissive does not mean that the trial court is unlimited in its responses to the failure of counsel or a party to answer a calendar call. The trial court could not, for instance, dismiss the matter with prejudice because, as the majority notes, the trial

court's discretion in dismissing is limited to a dismissal without prejudice. It is clear from that limitation that the legislature intended to limit the punitive options available to a trial court under these circumstances. The action of the trial court in the present case amounts to no more than a dismissal with prejudice, the entry of judgment without a presentation of the merits, based solely on the absence of a party and counsel. Even under former law which permitted dismissal with prejudice in the context of involuntary dismissals, such a harsh sanction was not to be imposed on the basis of absence alone. Hancock v. Oates, 244 Ga. 175 (259 SE2d 477) (1979). It may be seen, then that the trial court's decision to go ahead with the trial in the absence of the plaintiff and plaintiff's counsel was merely an

indirect means of accomplishing what the legislature has decreed shall not be accomplished directly.

To answer the concern that the decision of the Court of Appeals leaves trial courts at the mercy of dilatory or neglectful attorneys and parties, I would note that there are sanctions in place to deal with the failure of attorneys and parties to appear at the call of cases in which they are involved. An involuntary dismissal without prejudice, with its attendant expense, delay, and inconvenience is one such sanction. The provision in USCR 14, cited by the majority, for holding an attorney in contempt for failure to appear at the call of a case is another. A more creative approach than the entry of a final judgment without the presentation

of evidence by the party bearing the burden of proof might be the award to the opposing party of expenses of litigation based on the offending party's or attorney's unnecessary expansion of the litigation. Any of those approaches would better serve the ends of justice than the punitive measure imposed by the trial court.

The opinion of the Court of appeals accurately set out the law and applied it to this case. I would, therefore, affirm the judgment of the Court of Appeals; I must, therefore, dissent. I am authorized to state that Justices Fletcher and Sears-Collins join in this dissent.

In the Court of Appeals of Georgia

A91A1084. ABAD v. KRAFT.

Dated Dec. 4, 1992

Cooper, Judge.

This court entered a judgement in the above-styled case at 201 Ga. App. 523 (411 SE2d 500) (1991) reversing the judgment of the trial court. The Georgia Supreme Court granted certiorari in Kraft v. Abad, 262 Ga. 336 (417 SE2d 317) (1992) and reversed our holding. Accordingly, our judgment is hereby vacated, and the judgment of the Supreme Court is made the judgment of this court with respect to appellant's first enumeration of error. In our first opinion, we declined to address appellant's second enumeration of error in which she argued that the trial court erred in striking her demand for a jury trial. We conclude that the authority to

(s)

also strike appellant's demand for a jury trial was implicit in the trial court's authority to enter judgment in favor of the appellee/defendant upon appellant/plaintiff's failure to appear at trial. Cf. Stewart v. Stewart, 260 Ga. 812 (400 SE2d 622) (1991). Appellant's reliance on Sewell v. Leifer, 144 Ga. App. 36 (240 SE2d 584) (1977) is misplaced. In that case, the trial judge entered judgment in favor of the plaintiff upon the defendant's failure to appear, but there remained the issue of damages to be tried by the jury. Furthermore, any error in striking appellant's demand was harmless since appellant failed to present any evidence and judgment for appellee was demanded. See Marler v. C & S Bank, 239 Ga. 342 (236 SE2d 590) (1977). Accordingly, we find no merit to this enumeration of

error.

Judgment affirmed. Birdsong, P.J., and Pope, J., concur.

Amendment 5 to the Constitution of the United States, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 7 to the Constitution of the United States, "In suits at common law,

where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment 14, Section 1, to the Constitution of the United States, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws."

The Preamble of the Constitution of the State of Georgia of 1983, "To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty, we the people of Georgia, relying upon protection and guidance of Almighty God, do ordain and establish this Constitution."

Article 1, S 1, P 1 of the Constitution of the State of Georgia of 1983, "No person shall be deprived of life, liberty, or property except by due process of law."

Article 1, S 1, P 2 of the Constitution

of the State of Georgia of 1983, "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

Article 1, S 1, P 11 (a) of the Constitution of the State of Georgia of 1983, "(a) The right to trial by jury shall remain inviolate, except that the court shall render judgment without verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.

Official Code of Georgia Annotated, Section 9-11-38, "The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate."

Official Code of Georgia Annotated, Section 9-11-39, "(a) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, may consent to trial by the court sitting without a jury. (b) In all actions not triable of right by a jury, or where jury trial has been expressly waived, the court may nevertheless order a trial with a jury whose verdict will have the same effect as if trial by jury had been a matter of right or had not been waived."

Official Code of Georgia Annotated, Section 9-11-41 (b), "**Involuntary dismissal**; effect thereof. For failure of the plaintiff to prosecute or to comply with this chapter or any order of Court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine the facts and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. Unless the court in its order for dismissal

otherwise specifies, a dismissal under this subsection and any dismissal not provided for in the Code section, other than a dismissal for lack of jurisdiction or for improper venue or lack of an indispensable party, operates as an adjudication upon the merits."

Uniform Superior Court Rules, of the State of Georgia, Rule 8.4, "Trial Date. The parties and counsel in the first 10 actions on the published trial calendar shall appear ready for trial on the date specified unless otherwise directed by the assigned judge. Parties in all other actions on the calendar are expected to be ready for trial but may contact the calendar clerk to obtain: (A) A specific date and time for trial during the trial term specified in the calendar; or, (B) Permission to await the call by the

calendar clerk of the action for trial upon reasonable notice to cousel.

Uniform Superior Court Rules, of the State of Georgia, Rule 14, "**DISMISSAL** On its own motion or upon motion of the opposite party, the court may dismiss without prejudice any civil action, or where appropriate, any pleading filed on behalf of any party upon the failure to properly respond to the call of the action for trial or other proceeding. In civil actions or criminal cases the court may adjudge any attorney in contempt for failure to appear without legal excuse upon the call of any proceeding."

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERMA L. ABAD,

Petitioner

versus

KRAFT, INC.,

CHARLES H. DIAL,

Respondents

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the clerk of the Supreme Court of the United States, forty copies, and counsel for the Respondents in the foregoing matter, a copy of the PETITION FOR WRIT OF CERTIORARI, by depositing

same in the United States Mail in a properly addressed envelope, adequate postage thereon to:

Clerk, Supreme Court of the United States
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Dated this 2nd day of March, 1993

Jonap & Associates, P.C.

By: _____
Arthur C. Nilsen
Georgia State Bar # 538860

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